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Whose Life? Whose Liberty? Whose Happiness?: A Review of The Morality of Abortion: Legal and Historical Perspectives by John T. Noonan

Daniel E. Pilarczyk
Archdiocese of Cincinnati

Book Review

WHOSE LIFE? WHOSE LIBERTY? WHOSE HAPPINESS?: A REVIEW OF THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES.*

Daniel E. Pilarczyk**

John Noonan is a professor of law at the University of California at Berkeley. He is well known to Catholics for his historico-theological study of contraception which appeared several years ago. Now he turns his attention to another moral question which is, or should be, of interest not only to moralists and theologians, but also to everyone who is concerned with human life in even the remotest fashion. *The Morality of Abortion* grew out of an international conference on abortion held in Washington in 1967 under the joint sponsorship of the Joseph P. Kennedy, Jr., Foundation and the Harvard Divinity School. The editor presents seven essays by highly qualified authors on several aspects of the abortion question.

The first essay is by Noonan himself. It is entitled "An Almost Absolute Value in History,"[1] and is a history of moral teaching on abortion from pagan times to the twentieth century. Abortion was well known in pagan antiquity. Plato and Aristotle speak of it as a means of population control, though the Hippocratic oath requires the physician to swear that he will not give an abortifacient to a woman. Yet abortion was widely practiced in the Graeco-Roman world, since the parents' absolute freedom to dispose of their young offspring was generally taken for granted. Under the influence of the command to love one's neighbor, Christians gave new value to human life, even before its birth. Noonan gives an impressive series of citations from Christian writers, beginning with St. Paul, who saw abortion as an

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* THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES. Edited by John T. Noonan. Cambridge, Mass.: Harvard University Press, 1970. Pp. 320. $8.95.

** Daniel E. Pilarczyk is a Roman Catholic priest of the Archdiocese of Cincinnati. He holds a doctorate in theology from the Pontifical University for the Propagation of the Faith in Rome and a doctorate in philosophy from the University of Cincinnati. He is consulting theologian for the Good Samaritan Family Planning Clinic in Cincinnati and chaplain for the National Catholic Pharmicists Guild. At present he is rector of St. Gregory Seminary in Cincinnati, where he also teaches classics and theology.

[1] THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVE 18 (J. Noonan ed. 1970).

unmitigated moral evil. In the conclusion to this section of the essay he says:

> By 450 the teaching on abortion (in) East and West had been set out for four centuries with clarity and substantial consistency. . . . All the writers agreed that abortion was a violation of the love owed to one's neighbor. Some saw it as a special failure of maternal love. Many saw it also as a failure to have reverence for the work of God the creator. The culture had accepted abortion. The Christians, men of this Graeco-Roman world and the Gospel, condemned it. Ancient authorities and contemporary moralists had approved, hesitated, made exceptions; the Christian rule was certain.

In the centuries that followed a certain amount of casuistry arose, based in part on various theories about the time of "ensoulment," but the basic principles remained: per se abortion is wrong and only the most extreme circumstances permit the destruction of the fetus. Yet there was another, more severe, current of thought during these same centuries in papal legislation. While the casuists tended to question the absolute prohibition, papal legislation tended to reinforce the prohibition out of concern for the rights of the embryo unable to defend itself. After 1750 the papal position triumphed and the exceptions permitted by earlier casuists were gradually rejected, until finally the Church returned to the patristic position that any direct killing of the fetus is wrong. In conclusion Noonan answers some of the reasons adduced by contemporary proponents of "liberalized" abortion laws. The basic problem is: How do you determine the humanity of a being?, and the basic Christian answer is: If you are conceived by human parents, you are human. To determine humanity by viability, experience, sensation by the parents, or social visibility is either to make use of arbitrary criteria or to exclude some adults who are universally acknowledged to be human. Noonan gives convincing scientific arguments for the humanity of the fetus from its very beginning.

> If a fetus is destroyed, one destroys a being already possessed of the genetic code, organs, and sensitivity to pain, and one which had an 80 percent chance of developing further into a baby outside the womb who, in time, would reason.[2]

This is a fine paper which examines dispassionately the Christian and Catholic tradition on the morality of abortion and which pokes appropriate holes in the arguments of those who would undermine that tradition.

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[2] *Id.* at 57.

The second paper in the book is by Paul Ramsey, Professor of Christian Ethics at Princeton, a well known Protestant moralist. The essay is rightly entitled "Reference Points in Deciding about Abortion," since it treats only some aspects of the controversy, and makes no claim to providing a complete and organic moral treatise. Ramsey discusses the rightful place of organized religion in the controversy pointing out that "on the question of abortion, each disputant has a religious faith in an ethical creed,"[3] whether he be theist, atheist, or agnostic. He also underlines the distinction between sin and crime, and says that everything that certain people consider sinful need not be fit matter for public legislation. There follows an extended treatment of the biological development of the fetus from which Ramsey concludes that human life is certainly present in the fetus long before the time limit for "justified abortion" set by any of the enacted or proposed new abortion laws.

> Searching for an explanation of this strange discrepancy, we must simply conclude that the proposed liberalization of abortion law is in no way based rationally on concern for the fetus and the nature of its development. The proposed laws are rather statements about the mother, or based upon the assumed safety of the operation upon her.[4]

In the next section of his essay, Ramsey makes one of the most striking and cogent points of the whole book, viz., that, given the linear development of the fetus from conception to full human maturity, and given the almost spontaneous conviction that the fetus is in some way human, what the abortionists need is a rational moral argument for feticide that is not also logically an argument for infanticide. So far, such an argument has not been presented. Finally he points out that future developments in pre-natal medicine will obliterate the distinction between the pre- and the post-natal period, and that therefore the same ethics that govern prolongation and care of all human life must also be applied to life before birth. In this paper Ramsey indicates several important dilemmas that the proponents of new abortion laws will have to answer if the controversy is going to remain on, or ever be brought to, rational ground.

One of the least satisfying essays in the collection, at least to this reviewer, is "A Protestant Ethical Approach," by James M. Gustafson, Professor of Christian Ethics at Yale University. Gustafson begins by rejecting the general approach of Catholic moral theologians and of Protestants like Paul Ramsey on the grounds that they are excessively

[3] *Id.* at 62.
[4] *Id.* at 78.

juridical and rationalistic, concerning themselves too little with the sensibilities, emotions, and private experiences of mothers and physicians. He then outlines his own position through the example of a woman who seeks counsel after being raped by her former husband and his friends. After some discussion of moral principles, he concludes that an abortion would be justifiable here, not because of a serious threat to the mental or physical health of the woman, but for the sake of the well-being of the woman over a long range of time. Gustafson concludes that "Since there is not a single overriding determination of what constitutes a right action, there can be no unambiguously right action,"[5] and that what is to be stressed is "the primacy of the person and human relationships and the concreteness of the choice within limited possibilities."[6] Gustafson tries to distinguish his position from that of "situation ethics," but this reviewer is not sure that he succeeds. At risk of sounding waspish, I would ask where the "person and human relationships" of the fetus fit into this kind of morality. Gustafson says:

> Whereas the moral theology manuals generally limit discussion to the physical aspects of the human situation, I have set those in a wider context of human values, responsibilities, and aspirations.[7]

But all of this takes no account of the rights of the fetus. Whose human values are being defended at the expense of whom? Responsibilities? Toward whom?

The next essay, "A Theological Evaluation," is by Bernard Häring, one of the most widely known Catholic moralists of our day. Like Ramsey, he makes no claim to set out a complete position on abortion, but merely an eclectic treatment of certain facets of the problem. Unfortunately, much of what Fr. Häring says here is a repetition of what is found elsewhere in the book. He calls for a greater distinction in the Catholic position between what is essential and the less sure conclusions and arguments, and for some "refinements" of Catholic theology in areas such as indirect abortion and the termination of an ectopic pregnancy. Almost as if to answer Gustafson, Häring suggests that religious counsellors try to motivate their clients and respect their invincible ignorance when they are unable to "realize" a moral obligation. Finally he suggests that any agitation against a change in the abortion laws should be based on arguments for the common good rather than on purely "natural law" arguments or the

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[5] *Id.* at 119.
[6] *Id.*
[7] *Id.* at 121.

religious teaching of a specific church. What Häring says seems valid. One is somewhat sorry, however, that he actually says so little.

George Huntston Williams, Hollis Professor of Divinity at Harvard, takes an interesting position in "The Sacred Condominium." He proposes a politics of abortion "in which parents and the body politic are understood to share sovereignty in varying degrees and in varying circumstances."[8] Both the state and the parents, he argues, share dominion over and responsibility for the fetus.

> Although the quasi-political theory of condominium presupposes that the fetus is at least an inchoate person in consonance with he patristic-papal line of development, the theory of corule also reinstates something of the scriptural-rabbinical view that the mother is sovereign over the fruit of her womb, even if she can no longer maintain anatomically and hence morally that the fetus is merely a limb or growth.[9]

When the rights of the fetus and the rights of the mother come into conflict, a "condominial court" would sit in which the two sovereignties would be represented by medical magistrates to defend the rights of both mother and fetus. Other experts would be called in to inform the judgment of the officers of the court. Such a procedure would serve to clarify the politics and laws of limited abortion. If valid reasons for an abortion were brought forth, the state would withdraw its protection from the fetus and allow the parents to make the final decision whether to abort or not. While this reviewer sees value in such a structure, he is disappointed that Williams does not spell out more clearly the legal and moral criteria according to which the state would be justified in withdrawing its protection from the fetus. At any rate, the author does recognize that the fetus has rights and this is a step in the right direction.

In "Three Schemes of Regulation" John M. Finnis, Professor of Law at University College, Oxford, examines the presuppositions and consequences of three types of abortion legislation. The first is the traditional scheme of the English-speaking world which prohibits all abortion except when the life of the mother is threatened. Its objectives are two-fold: (1) the protection of unborn children from destruction and (2) the protection of mothers from incompetent operators. This type of abortion law embodies one of the most fundamental principles of Western law, viz., that all human life is to be free from deliberate or negligent attack. The second scheme permits abortion when authorized by official personnel according to

[8] *Id.* at 147.
[9] *Id.* at 153.

specific criteria. Its aims are to preserve the dignity and rights of the medical profession, to recognize the right of the woman over her own body, and to suppress unskilled abortions. Yet, Finnis observes, it is impossible to maintain all these objectives together. What happens when the "right" of the woman conflicts with the judgment of her doctor, or when medical ethics are so restrictive that women seek out unskilled abortionists? The third type of abortion legislation permits abortion when ever it is performed by a qualified physician. The aims are to protect the rights of women over her body and to eliminate unskilled abortions. Obviously in this scheme the fetus has no rights whatsoever. This article is valuable for several reasons. In the first place it provides the statistical information required in order to make some judgment of the success of the various abortion law patterns that have been tried in Scandinavia, Eastern Europe, and Britain. In general, the results of liberalized abortion laws are not encouraging. He also calls for citizens to be aware of what they are talking about when they propose a shift to the third scheme of abortion legislation, since a move toward that system will almost certainly be an erosion of the old "rule" of the sanctity of human life. Finally he demands a careful consideration of ends and means in any legal reform, since "'pragmatism' and 'moderate reform' are not synonyms for rationality; in much recent thought, they are substitutes."[10]

In the final essay in the book, David W. Louisell, also Professor of Law at the University of California at Berkeley, collaborates with John Noonan to discuss "Constitutional Balance." They begin with a treatment of the fetus in the law, discussing the law of property, criminal law, and the law of torts. They show that in all three areas the fetus enjoys a standing equal to that of any of any other child. The authors then treat the constitutionality of regulating abortion and show that many and perhaps all the reasons adduced for withdrawing abortion legislation are insufficient or invalid. Neither the right to privacy, nor to determination of family size, nor to self-determination for a woman outweigh the rights of the living person in its mother's womb. They express strong reservations toward the California Supreme Court decision of 1969 (*People v. Belous*) which invalidated that state's abortion statute on the grounds of vagueness. They are also quite skeptical about the figures for illegal abortions which proponents of change bring forth to prove the unenforceability of present legislation. The figures vary between 40,000 and 1,200,000 and are little more than guesses. There follows a section on the constitu-

[10] *Id.* at 177.

tionality of not protecting the embryo in which the authors point out that

> It would be strange if a fetus had rights to support from his parents, rights enforceable by a guardian and sanctioned by the criminal law of neglect, and yet have no right to be protected from abortion.[11]

They see a real consitutional question here.

> If the protection of the law were withdrawn from the child, then the life of the child could be taken at the will of the parent. If the state permitted this, it would be a discriminatory act barred by the Constitution.[12]

They suggest that even under present legislation a guardian of the rights of the fetus should be appointed to provide proper protection for it from unnecessary abortion or abortion based on fraudulent claims by the parents. In conclusion they put the whole discussion exactly where it belongs, at least in the mind of this reviewer, viz., in the context of the protection of human life.

> Easy legal abortion presents a genuine and disturbing reversal of the law's steady progress toward recognition of the dignity, value, and essential equality of human life.[13]

The book has a detailed index, a table of statutes, and a table of cases.

By now the position of this reviewer should be apparent to every reader. To me, the abortion controversy is of significance not only as a moral or ethical question, but also as a political and social question of the first magnitude. In the first place, it cannot be shown that a fetus is not human at any given point in its development. It would seem, then, that it must be given the protection and respect that we give to all human life. Secondly, if society decides that the fetus is not to be given legal protection, then society is withdrawing one of the basic rights that defends all of us. Society is deciding which of its members may be eliminated at the will or whim or other members. As an individual citizen who enjoys human existence, I find this downright frightening. If it is to be socially and legally acceptable to do away with unborn children who would cause inconvenience of one kind or another to their parents, why is it not to be acceptable to do away with other human beings who are, or who are thought to be, an inconvenience to individuals or to society at large? One thinks

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[11] *Id.* at 246.
[12] *Id.*
[13] *Id.* at 258.

spontaneously of the senile, the insane, the criminal. With a little imagination one can also think of Catholics, or Jews, or blacks, or Marxists, or leftists, or rightists, or anyone else who could conceivably be troublesome to society. When people talk about abortion on demand they are talking about my life, too.

The *Declaration of Independence* says that our country holds it selfevident that all men are endowed with unalienable rights to life, liberty, and the pursuit of happiness. Legally the fetus is considered a man, human. Biologically it is a man, human. In the present controversy over abortion it is imperative that we keep our ideas clear and that we know exactly what is at issue. Whose happiness are we going to be concerned with? Whose liberty? Whose life?

When I was invited to do this review, the editors suggested that I point up the book's value (or lack of it) to the legal community. Would men of the law find this volume interesting? Theological and ethical considerations take up a large part of the book. Legal considerations are generally confined to the last three chapters. Yet I believe that the nature of the subject matter is such that the entire book could be read with profit by people dedicated to the protection of the rights of their fellow citizens. An easier question to answer would be whether men and women of the law should be interested in this subject at all. My response to that is that they had better be.